

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 1, 2008

In the Matter of
Town of Hopkinton DPW

OADR Docket No. WET-2007-010
DEP File No. 188-1365
Hopkinton, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Brian Morrison, on behalf of a 10 resident group known as “Residents Appeal of Fruit Street” (“Mr. Morrison” or “the petitioner”), challenges the November 19, 2007 Superseding Order of Conditions (“SOC”) that the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Town of Hopkinton (“the applicant” or “the Town”) in connection with the Town’s proposed construction of a wastewater treatment facility (“WWTF”) on Fruit Street in Hopkinton. See Superseding Order of Conditions (“SOC”) and SOC cover letter, November 19, 2007.¹ MassDEP issued the SOC in response to the petitioner’s appeal of a January 2007 Order of Conditions (“OOC”) that the Town’s Conservation Commission (“the HCC”) issued authorizing the project pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”),

¹ The SOC is a “Reviewable Decision” of MassDEP in a Wetlands Permit case that is subject to appeal pursuant to 310 CMR 10.04 and 310 CMR 10.05(7)(j), effective October 31, 2007.

and the Wetlands Regulations at 310 CMR 10.00, et seq.² This appeal is one of three appeals pending before MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) that the petitioner or persons aligned with him have filed objecting to the Town’s construction of the WWTF at its proposed location.³

The petitioner contends that the SOC violates the MWPA and Wetlands Regulations because the SOC authorizes the Town’s construction of a bridge over an intermittent stream to access the proposed WWTF, and because the area borders Whitehall Brook, an Outstanding Resource Water (“ORW”) under the Massachusetts Surface Water Quality Regulations at 314 CMR 4.00. Petitioner’s Pre-Hearing Statement, at p. 1.

The Town and the Department contend that the Department properly issued the SOC “for work associated with a proposed [WWTF].” Applicant’s Pre-Hearing Statement, at p. 1; Department’s Amended Pre-Screening Conference Submittal, at pp. 1-2. They also contend that the proposed wetland crossing (the bridge) “proposes to restore the bordering vegetated wetlands that were altered as part of a prior approved wetland crossing.” Applicant’s Pre-Hearing

² The HCC also authorized the project pursuant to the Town’s Wetlands Protection Bylaw, and the petitioner appealed that decision to Superior Court. See Department’s Amended Pre-Screening Conference Submittal, n.1, at p. 1. The Superior Court dismissed that appeal on standing grounds and the petitioner appealed the Court’s dismissal to the Appeals Court. Id. The petitioner’s appeal is pending before the Appeals Court. See Brian D. Morrison v. Hopkinton Conservation Commission, Appeals Court Docket No. 2007-P-1718.

³ The other two pending appeals in OADR are the following:

- (1) In the Matter of Town of Hopkinton, OADR Docket No. 2007-148. In that appeal, various individuals, including the petitioner, challenge the Groundwater Discharge Permit that the CERO Office issued to the Town in August 2007 in connection with the Town’s proposed WWTF (“the Groundwater Discharge Permit Appeal”); and
- (2) In the Matter of Town of Hopkinton, OADR Docket No. 2007-165. In that appeal, various individuals, including the petitioner, challenge the Water Quality Certification (“WQC”) that the CERO Office issued to the Town in November 2007 in connection with the Town’s proposed WWTF.

Statement, at p. 2; Department's Amended Pre-Screening Conference Submittal, at pp. 1-2.

On January 2, 2008, I conducted a Pre-Screening Conference in this appeal in accordance with 310 CMR 1.01(5)(a)15; 310 CMR 10.05(7)(j)7.a; and a Scheduling Order that I issued to the parties on December 17, 2007. At the Pre-Screening Conference, the parties agreed that the issues for resolution in the appeal were the following:

- (1) Whether the proposed wetland crossing (the proposed bridge) will alter bordering vegetated wetlands, and if so, does the proposed wetland crossing meet the performance standards of 310 CMR 10.55(4)?
- (2) Whether there will be work in land under water, and if so, does the applicant's project meet the performance standards of 310 CMR 10.56(4)?
- (3) Is the Department required to apply the Department's anti-degradation requirements [in 314 CMR 4.00] in connection with its issuance of the SOC?

On April 1, 2008, I conducted a hearing to resolve the issues in the appeal ("the Hearing"). At the Hearing, a total of four witnesses testified under oath on behalf of the parties. Each witness was a wetlands or engineering expert who had filed sworn Pre-filed Testimony ("PFT") prior to the Hearing in support of the parties' respective positions in the case. At the Hearing, each witness was cross-examined on his or her PFT.

The petitioner called one witness: Amy M. Ball ("Ms. Ball"), a Senior Wetlands Scientist employed by the Horsley Witten Group, Inc. in Sandwich, Massachusetts with more than 12 years experience as a wetlands consultant. Ms. Ball's PFT, ¶¶ 1-6.

The Town called two witnesses: (1) Paul McManus ("Mr. McManus"), a certified Professional Wetland Scientist with more 21 years of full-time environmental consulting experience (Mr. McManus's PFT, ¶¶ 1-6); and (2) Thomas E. Parece ("Mr. Parece"), a civil engineer and a Registered Professional Engineer with more than 25 years of experience

designing wastewater treatment facilities (Mr. Parece's PFT, ¶¶ 1-6).

The Department called one witness: Martin P. Jalonski ("Jalonski"), an Environmental Analyst for the Department "[with] over 24 years of experience working in the [Department's] Wetlands and Waterways Program. . . ." See Mr. Jalonski's Pre-filed Testimony, ¶¶ 1-4. During his tenure with the Department, the agency "has approved and issued over 400 state wetlands permits/Determinations that [Mr. Jalonski] has drafted and recommended for [Department approval]." *Id.*

Based on the requirements of the MWPA and the Wetlands Regulations, and the testimonial and documentary evidence of the parties' respective witnesses, I recommend that MassDEP's Commissioner issue a Final Decision affirming the Department's issuance of the SOC to the Town. As discussed below, at pp. 7-15, the petitioner failed to demonstrate that the Department improperly issued the SOC. The testimonial and documentary evidence submitted by the Town and the Department demonstrate that the Department properly issued the SOC pursuant to the MWPA and Wetlands Regulations.

THE GOVERNING APPELLATE REGULATIONS

I. THE PARTIES WHO MAY APPEAL A SOC AND THE 10 BUSINESS DAY APPEAL DEADLINE

Under 310 CMR 10.05(7)(j)2.a, various parties may appeal a SOC, including any 10 residents of the city or town where the land is located, if at least one resident was previously a participant in the permit proceeding.⁴ The appeal must be filed with MassDEP's OADR within

⁴ The other parties who may appeal a SOC are the following:

- (1) the applicant (the person who filed the Notice of Intent ("NOI"), or on whose behalf the notice was filed with the local conservation commission that approved or denied the project that is the subject of the SOC);

10 business days after the SOC's issuance. 310 CMR 10.05(7)(j)2.a. The Appeal Notice must contain:

a clear and concise statement of the alleged errors contained in the [SOC] and how each alleged error is inconsistent with 310 CMR 10.00 and does not contribute to the protection of the interests identified in the Wetlands Protection Act, M.G.L. c. 131, section 40, including reference to the statutory or regulatory provisions the [petitioner] alleges has been violated by the [SOC], and the relief sought, including specific changes desired in the [SOC].

310 CMR 10.05(7)(j)2.b.v.

II. THE PETITIONER'S BURDEN OF PROOF IN A SOC APPEAL

As the party challenging the SOC, the petitioner has the burden of proof on all issues, including whether the Department improperly issued the SOC. See 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. Section 10.05(7)(j)3.a of 310 CMR provides that:

[a] Party who has timely filed an Appeal Notice must file with the Department and serve a copy on all parties its ***Direct Case*** no later than forty-five days after the Pre-screening Conference.

(emphasis supplied). The petitioner's "Direct Case" is:

the evidence that [the petitioner] seeks to introduce in support of its position, as well as any legal argument the [petitioner] wishes to provide. The Direct Case may include, but is not limited to, statements under oath by lay witnesses and expert witnesses, technical reports, studies, memoranda, maps, plans, and other information that a party seeks to have the Presiding Officer review as part of the

-
- (2) the landowner (the owner of record of the land or an interest in the land that is the subject of the SOC);
 - (3) the local conservation commission that approved or denied the project that is the subject of the SOC; or
 - (4) any "aggrieved person if previously a participant in the permit proceedings."

310 CMR 10.04; 310 CMR 10.05(7)(j)2.a.

adjudicatory proceeding.

Under 310 CMR 10.05(7)(j)3.b:

[t]he Petitioner has the burden of going forward pursuant to 310 CMR 10.03(2), and proving its direct case by a preponderance of the evidence.

This means that the petitioner must “produce at least some credible evidence from a competent source in support of [the petitioner’s] position[s].” 310 CMR 10.03(2); 310 CMR 10.05(7)(j)3.b. Indeed, in challenging MassDEP’s factual determinations in the SOC, the petitioner must present “credible evidence from a competent source in support of each claim of factual error, including any relevant expert report(s), plan(s), or photograph(s).” 310 CMR 10.05(7)(j)3.c. The petitioner’s failure to present that evidence will constitute a waiver of the petitioner’s claims. Id.

The relevancy and admissibility of evidence that the parties to the appeal seek to introduce in the hearing on the merits are governed by G.L. c. 30A, § 11(2). The statute provides that:

Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

The provisions of G.L. c. 30A, § 11(2) are incorporated in 310 CMR 1.01(13)(h), which also govern Wetland Permit Appeal hearings. See 310 CMR 10.05(7)(j)9. Section 1.01(13)(h)(1) of 310 CMR provides that:

Unless otherwise provided by any law, the Presiding Officer need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious

or irrelevant evidence may be excluded.

Based on the discretion accorded to me by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1), I have only considered the sworn Pre-filed Testimony and Hearing testimony of the parties' respective witnesses and the documentary evidence referenced in their testimony in making my findings and recommendations in this Recommended Final Decision. I have accorded little or no weight to the documents contained in a compact disk ("CD") that the petitioner submitted at the inception of this appeal because most, if not all, of the documents have little or no probative value. I have also not considered the documents that the petitioner attempted to submit post-Hearing with his April 8, 2008 proposed Findings of Fact and Rulings of Law. Those documents are inadmissible because the evidence was closed at the conclusion of the Hearing on April 1, 2008.

DISCUSSION

ISSUE No. 1: Whether the proposed wetland crossing (the proposed bridge) will alter bordering vegetated wetlands, and if so, does the proposed wetland crossing meet the performance standards of 310 CMR 10.55(4)?

Based on the requirements of the MWPA and the Wetlands Regulations, and the testimonial and documentary evidence of the parties' respective witnesses, I find that the proposed bridge at the Site will alter bordering vegetated wetlands, but the project meets the performance standards of 310 CMR 10.55(4).

Applicable Law Governing Issue No. 1

Activities impacting bordering vegetated wetlands are regulated by 310 CMR 10.55. The regulation defines "bordering vegetated wetlands" as:

freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering Vegetated Wetlands are areas where the soils are saturated and/or

inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40.

310 CMR 10.55(2)(a).

“Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat.” 310 CMR 10.55(1). “The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters.” Id.

“Where a proposed activity involves the removing, filling, dredging *or altering* of a Bordering Vegetated Wetland,” the Department must presume that the area at issue is significant to the interests specified in 310 CMR10.55(1): public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, and the protection of fisheries and to wildlife habitat. 310 CMR 10.55(3) (emphasis supplied).⁵ “This presumption is rebuttable and may be overcome upon a clear showing that the Bordering Vegetated Wetland does not play a role in the protection of said interests.” Id. Where this presumption “is not

⁵ The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40.” Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04.

overcome, any proposed work in a Bordering Vegetated Wetland shall not destroy or otherwise impair any portion of said area.” 310 CMR 10.55(4)(a). Notwithstanding this prohibition, the Department nevertheless has the discretion to issue a SOC:

permitting work which results in the loss of up to 5,000 square feet of Bordering Vegetated Wetland when said area is replaced in accordance with . . . [seven] general conditions and any additional, specific conditions the [Department] deems necessary to ensure that the replacement area will function in a manner similar to the area that will be lost.

310 CMR 10.55(4)(b).⁶ In exercising its discretion, the Department must consider the following factors:

1. the magnitude of the alteration and the significance of the project site to the interests identified in M.G.L. c. 131, § 40;
2. the extent to which adverse impacts can be avoided;
3. the extent to which adverse impacts are minimized; and

⁶ The seven general conditions are the following:

1. the surface of the replacement area to be created ("the replacement area") shall be equal to that of the area that will be lost ("the lost area");
2. the ground water and surface elevation of the replacement area shall be approximately equal to that of the lost area;
3. The overall horizontal configuration and location of the replacement area with respect to the bank shall be similar to that of the lost area;
4. the replacement area shall have an unrestricted hydraulic connection to the same water body or waterway associated with the lost area;
5. the replacement area shall be located within the same general area of the water body or reach of the waterway as the lost area;
6. at least 75% of the surface of the replacement area shall be reestablished with indigenous wetland plant species within two growing seasons, and prior to said vegetative reestablishment any exposed soil in the replacement area shall be temporarily stabilized to prevent erosion in accordance with standard U.S. Soil Conservation Service methods; and
7. the replacement area shall be provided in a manner which is consistent with all other General Performance Standards for each resource area in Part III of 310 CMR 10.00.

310 CMR 10.55(4)(b).

4. the extent to which mitigation measures, including replication or restoration, are provided to contribute to the protection of the interests identified in M.G.L. c. 131, § 40.

310 CMR 10.55(4)(b).

Stormwater discharges or runoffs to wetland resource areas such as an intermittent stream and bordering vegetated wetlands are governed by 310 CMR 10.02(2)(b)2.i and the Department's Stormwater Management Policy (March 1997).⁷ Under the Department's Stormwater Management Policy, stormwater discharges to critical areas such as ORWs must utilize stormwater Best Management Practices ("BMPs") that the Department has approved for those areas. See Standard No. 6 of Department's Stormwater Management Policy.

Findings of Fact Regarding Issue No. 1

1. The Town proposes to build the WWTF on a 257 acre parcel of land that the Town owns on Fruit Street in Hopkinton ("the Site"). Mr. Parece's PFT, ¶ 7. The Site "is a former [privately owned] sand and gravel operation and consists of forested areas and open gravel excavation locations." *Id.*

2. A portion of the Site borders on Whitehall Brook, an ORW designated by the Department pursuant to 314 CMR 4.06. Mr. Parece's PFT, ¶ 15.

3. An intermittent stream with bordering vegetated wetland runs through a part of the Site where the proposed WWTF will be located. Mr. McManus's PFT, ¶¶ 10-14; Mr. Parece's PFT, ¶¶ 19, 23. The bordering vegetated wetland is a "wood swamp" and classified as "Palustrine Forested Wetland bordering on an intermittent stream." Mr. McManus's PFT, ¶ 11.

4. There is an existing gravel driveway ("the driveway") that crosses over the intermittent stream. Mr. McManus's PTF, ¶ 10-14. The existing driveway is 45 feet long and 35

⁷ Pursuant to 310 CMR 1.01(13)(h)6, I take administrative notice of the Department's Stormwater Management Policy as cited in 310 CMR 10.02(2)(b)2.i.

feet wide (45' x 35'). Mr. McManus's PFT, ¶ 12. "At the crossing location, intermittent stream flows are contained within two 15 inch diameter concrete culverts." Id. The driveway was installed by the prior owner of the Site in accordance with an Order of Conditions ("OOC") that the HCC issued to the owner in 1999 pursuant to the MWPA and Wetlands Regulations. Id.

5. Under the OOC, the prior owner of the Site was required to remove the driveway, and restore any altered bordering vegetated wetlands and stream by 2002. Mr. McManus's PFT, ¶ 12. After the Town purchased the Site in 2002, the HCC granted the Town several extensions "to engineer the . . . crossing and file a Notice of Intent." Id. In 2006, the Town filed the Notice of Intent for the project at issue in this appeal. Mr. Parece's PTF, ¶ 10.

6. The Department's SOC authorizes the Town to remove the existing driveway at the Site by constructing a bridge over the intermittent stream and bordering vegetated wetlands that will be approximately 60 feet long and 20 feet wide (60' x 20'). Mr. McManus's PFT, ¶¶ 10-14, 17; Mr. Parece's PFT, ¶¶ 19, 23; Mr. Jalonski's PFT, ¶ 14. The culverts and fill that were installed when the driveway was constructed would also be removed. Id.

7. The proposed bridge "will be of the modular prefabricated steel stringer (beam span)" and "[t]his type of bridge is well suited for spanning the distance required by the project, and will support heavy vehicle loads from large operation delivery trucks." Mr. Parece's PFT, ¶ 23.

8. The proposed bridge will span or shade an area of approximately 1,200 square feet of bordering vegetated wetlands ("the impacted BVW") calculated by multiplying the dimensions of the bridge (60' x 20'). Ms. Ball's Rebuttal PFT, ¶ 4; Mr. McManus's PFT, ¶ 17; Mr. Jalonski's Cross-Examination Testimony (on cross-examination by the petitioner's counsel).

9. The bridge's shading of the impacted BVW will not result in the loss of the 1,200

square feet of bordering vegetated wetlands in that area, because sun light will reach the edges of the bridge's shaded area and its north/south orientation will allow sun light underneath the bridge from the west. Mr. McManus's PFT, ¶ 17; Ms. Ball's Cross-Examination Testimony (on cross-examination by the Department's counsel); Mr. Jalonski's Cross-Examination Testimony (on cross-examination by the petitioner's counsel). Additionally, the Town will replicate approximately 3,991 square feet of bordering vegetated wetland in the area (three times the area of the impacted BVW) through installation of erosion controls, segregation of topsoil, soil excavation, placement of topsoil, and planting. Mr. McManus's PFT, ¶¶ 18-19; Mr. Jalonski's PFT, ¶ 15; SOC, cover letter. The replication meets the performance standards of 310 CMR 10.55(4).

10. There will be no discharge of untreated stormwater to wetland resource areas from the bridge crossing. Mr. Parece's PTF, ¶¶ 19, 20; Ms. Ball's Rebuttal PTF, ¶ 2.

11. The Town's revised plans of March 18, 2008 provide the BMPs (water quality swales and detention basins) designed to treat 1.0 inch of runoff as required by Standard 6 of the Department's Stormwater Management Policy for critical areas such as ORW. Mr. Parece's PFT, ¶¶ 19-21, 27; Mr. Parece's Re-Direct Examination Testimony (on re-direct examination by the Town's counsel); Mr. McManus's PFT, ¶ 16. The Town added three (3) settling basins to the stormwater management system as part of those revised plans. Id. The Town added those three basins to enhance treatment of stormwater prior to discharge to the level spreader. Id. The Town was not required to submit new stormwater calculations for the revised plans because the Town's original stormwater calculations treated the entire existing driveway as impervious and no new impervious areas were added as part of the settling basins. Id.

12. Construction impacts to wetland areas at the Site will be minimized due to the

wetland restoration, and the required erosion and sedimentation controls. SOC; Mr. Parece's PFT, ¶¶ 19-22; Mr. McManus's PFT, ¶¶ 19 and 21(f); Mr. Jalonski's Cross-Examination Testimony (on cross-examination by the petitioner's counsel).

13. Prior to issuing the SOC, the Department, in accordance with 310 CMR 10.55(4)(b), considered the magnitude of the alteration of bordering vegetated wetlands at the Site (1200 square feet); the extent to which adverse impacts were avoided (the use of a spanned bridge and abutments outside the bordering vegetated wetlands; the extent to which adverse impacts were minimized (with a narrow bridge); and the mitigation measures (replication of more than triple the 1,200 square feet of bordering vegetated wetlands proposed to be altered partially by shading and restoration of previously filled wetlands). Mr. Jalonski's PFT, ¶¶ 13, 16.

14. The petitioner's wetlands expert testified that she had not been at the Site in the past six or seven years (since 2001). Ms. Ball's Cross-Examination Testimony (on cross-examination by the Town's counsel).

15. The Town's and the Department's wetlands experts have been to the Site during the past year and are familiar with the Site's wetlands characteristics. Mr. McManus's PFT, ¶ 9; Mr. Jalonski's PFT, ¶ 6.

16. The petitioner proposes that the WWTF be constructed in another area in Hopkinton known as "Elmwood Park." Ms. Ball's PFT, ¶10.

17. The Town does not desire to construct the WWTF at the Elmwood Park location because the Town's engineering experts have determined that the location does not have appropriate soils and depth-to-groundwater in order to allow for the discharge of 350,000 gallons

of sewage per day at that location. Mr. Parece's PFT, ¶¶ 26; Mr. Parece's Re-Direct Examination Testimony (on re-direct examination by the Town's counsel).

18. The petitioner did not present evidence that less bordering vegetated wetlands would be altered by construction of the WWTF at Elmwood Park location. Ms. Ball's Cross-Examination Testimony (on cross-examination by the Town's counsel). The petitioner's wetlands expert testified that she has never been to the Elmwood Park location, is unaware whether there are wetlands at that location, and is unable to evaluate the soils at the location. Id.

19. The petitioner's wetlands expert testified that she has not been involved in designing, permitting, or reviewing a proposed WWTF. Ms. Ball's Cross-Examination Testimony (on cross-examination by the Town's counsel).

ISSUE No. 2: Whether there will be work in land under water, and if so, does the applicant's project meet the performance standards of 310 CMR 10.56(4)?

The petitioner has waived this issue because "[he] concedes that no work is proposed in land under water." See Petitioner's Supporting Memorandum of Law (February 19, 2008), ¶ 12.

ISSUE No. 3: Is the Department required to apply the Department's anti-degradation requirements [in 314 CMR 4.00] in connection with its issuance of the SOC?

Issue No. 3 presents a question of law. I recommend that the Commissioner find that the Department was not required to apply the anti-degradation requirements in 314 CMR 4.04(3) in connection with its issuance of the SOC because those requirements govern different permits issued by the Department pursuant to the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-51.

As the Department correctly articulated in its March 20, 2008 Motion for Summary Decision On Issue 3, the MWPA and the Wetlands Regulations provide a comprehensive scheme and mechanism for the protection of wetland interests, including, but not limited to the protection

of bordering vegetated wetlands at issue in this SOC appeal. In order to determine whether bordering vegetated wetlands are adequately protected from potential negative project impacts, the correct reference is to the general performance standards for bordering vegetated wetlands found in 310 CMR 10.55(4) that were discussed above at pp. 7-10.

It is important to note that nowhere in the MWPA performance standards for bordering vegetated wetlands is there a cross-reference to the anti-degradation requirements found in 314 CMR 4.04(3). This is not surprising since those requirements have their genesis in the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-51, which governs permits for groundwater discharges and discharges into surface waters. Those permits have their own governing set of regulations (314 CMR 5.00 for groundwater discharges, and 314 CMR 3.00 and 9.00 for discharges to surface waters and Water Quality Certifications) with distinct and separate processes. The petitioner and the parties aligned with him have proven that point given that the proposed WWTF is the subject of three different permit appeals. See footnote 3, at p. 2 above.

CONCLUSION

Based on the foregoing, I recommend that MassDEP's Commissioner issue a Final Decision affirming the Department's issuance of the SOC to the Town. The petitioner failed to demonstrate that the Department improperly issued the SOC, and the testimonial and documentary evidence submitted by the Town and the Department demonstrates that the Department properly issued the SOC pursuant to the MWPA and Wetlands Regulations.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be

appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Date: _____

Salvatore M. Giorlandino
Acting Chief Presiding Officer

SERVICE LIST

Applicant: Town of Hopkinton
Department of Public Works
c/o J.T. Gaucher, Director
P.O. Box 209
Hopkinton, MA 01748
JTGaucher@hopkinton.org;

Legal representative: Richard A. Nylén, Jr., Esq.
Lynch, DeSimone, & Nylén, LLP
12 Post Office Square, Suite 600
Boston, MA 02109;

Petitioner: Brian Morrison, purportedly on behalf of
a 10 resident group known as
“Residents Appeal of Fruit Street”
P.O. Box 226
Woodville, MA 01784
b_Morrison@comcast.net;

Legal representative: Daniel J. Bailey III, Esq.
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110
dbailey@rackemann.com;

The Local Conservation Commission:

Town of Hopkinton Conservation Commission
c/o Robert G. Murphy, Ph.d, Chairman
Jeffrey S. Barnes, Vice-Chairman
Anna Rogers, Secretary
annar@hopkinton.org
Town Hall, 1st Floor, Room 106
18 Main Street
Hopkinton, MA 01748;

Legal representative: Richard A. Nylén, Jr., Esq.
Lynch, DeSimone, & Nylén, LLP
12 Post Office Square, Suite 600
Boston, MA 02109;

[continued next page]

Ten Citizens Group: same as petitioner;

Legal representative: same as petitioner;

Department:

Martin Jalonski, Wetlands Analyst
MassDEP/Central Regional Office
Bureau of Resource Protection
627 Main Street
Worcester, MA 01608;

Legal Representative: Rebecca Cutting, Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, Massachusetts 02108;